BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) INTERLOCUTORY ORDER
76760-s76H BY TOWN OF STEVENSVILLE)

* * * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on February 2, 1993, in Hamilton, Montana, to determine whether a Beneficial Water Use Permit should be granted to the Town of Stevensville under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4) (1991).

APPEARANCES

The Town of Stevensville appeared at the hearing by and through counsel Robert B. Brown, Town Attorney.

Bruce Park, Water Commissioner for the Town of Stevensville, appeared at the hearing as a witness for the Applicant.

Ralph Wood appeared at the hearing as a witness for the Applicant.

John Joost appeared at the hearing as a witness for the Applicant but did not testify.

Arlo C. Ellison appeared at the hearing as President of Objector Ellison Cattle Company.

Jean H. Ellison appeared at the hearing as Secretary-Treasurer of Objector Ellison Cattle Company.

Objector Michael Howell appeared at the hearing pro se.

Objector Vernon Woolsey appeared at the hearing pro se and as a witness for Michael Howell in his capacity as Burnt Fork Creek Water Commissioner.

Objector Elmer D. Severson appeared at the hearing pro se.

Objector Roy F. Stemman appeared at the hearing pro se.

Larry Schock, Civil Engineering Specialist with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

Cindy G. Campbell, Department's Hearings Unit Legal Secretary, appeared at the hearing.

Patti Miller, Program Assistant II with the Department's Helena Central Office, appeared at the hearing as an observer.

Objectors George E. Farrell, Donald C. Worm, and Richard E. Smith failed to appear at the hearing. The record shows a properly constituted Notice of Hearing was properly served on all parties on December 16, 1992, by certified mail, return receipt requested. See Mont. Admin. R. 36.12.204(1) (1991). Return receipts were received by the Department, each with a signature indicating receipt. The Hearing Examiner received no communication from the missing objectors prior to the hearing or subsequent to the close of the record. Therefore the absent objectors are in default. Defaulted objectors no longer retain the status of parties in this matter. Mont. Admin. R. 36.12.208 (1991).

USA Fish and Wildlife Service withdrew its objection by a letter received by the Department on January 8, 1993.

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EXHIBITS

Applicant offered three exhibits for inclusion into the record.

Applicant's Exhibit 1 is a copy of a portion of a USGS Quadrangle map that has the location of Applicant's proposed headgate, the location of the headgate on Mill Fork Creek, and the location of Applicant's collection wells identified. This exhibit was accepted into the record without objection.

Applicant's Exhibit 3 is a booklet entitled "Specifications for Infiltration Line on Water System Improvements" prepared by S & A Engineers. This exhibit was accepted into the record without objection.

Applicant's Exhibit 4 consists of 23 photographs identified by letters and numbers. The photographs were taken by Chief Barnett who was not present at the hearing.

Photograph A is purported to be of water flowing from North Swamp Creek into Supply Ditch on December 16, 1992.

Photograph B is of Bruce Park standing in North Swamp Creek where it flows into Supply Ditch on January 15, 1993.

Photograph C is of Bruce Park measuring the width of Elmer Severson's headgate just below Applicant's reservoir on the north side of the highway on December 16, 1992.

Photograph E depicts the fence line between Applicant's property and Michael Howell's property and purportedly shows no ice or water coming from Applicant's property on to Mr. Howell's property on December 16, 1992.

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Photograph F shows the fence line and Michael Howell's property beyond the fence for the same reason stated above for photograph E. This photo was taken on December 16, 1992.

Photograph G is of Michael Howell's property to show the accumulation of ice purported to have originated from leakage of Mr. Howell's own headgate on December 16, 1992.

Photograph H is purported to show Applicant's property showing no water or ice build-up on January 15, 1993.

Photograph I is purported to show Mr. Howell's iced-up headgate that had ice coming under it; that on January 15, 1993, it had not worsened and there was just snow on top of it.

Photograph J is of Applicant's right-of-way into its property of 25 acres and is intended to show there is no ice or water, just snow, on January 15, 1993.

Photograph K shows ice in Mr. Howell's field on December 16, 1992.

Photograph L depicts the east end of Applicant's property where Mr. Howell's ditch comes out into his own property and is purported to show there is no ice coming out of Applicant's property into Mr. Howell's ditch on January 16, 1992.

Photograph M is purported to be taken of the No. 3 collection well site while standing next to Applicant's most northern collection well on December 16, 1992. This picture

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is intended to show there is no ice.

Photograph N is purported to be Bruce Park measuring the water at Elmer Severson's headgate on North Swamp Creek below the Town's reservoir on December 16, 1992.

Photograph P is purported to show North Swamp Creek where it goes under Logan Lane on December 16, 1992.

Photograph Q is purported to be taken at Elmer Severson's headgate on North Swamp Creek to show the depth of the water on January 11, 1993, when the temperature was 12 degrees below zero.

Photograph R depicts Applicant's 25 acres looking to the east. The intent of this picture is to show there was no ice there on December 16, 1992.

Photograph S taken from the northwest corner of Applicant's property purported to show by the vehicle tracks in the snow that there was no water or ice on there on January 15, 1993.

Photograph T taken from the southwest corner of Applicant's property is purported to show by the vehicle tracks in the snow that there was no water or ice under the snow on January 15, 1993.

Photograph U is purported to show the lower west side of Applicant's property and direction of flow where water is released to flow across the ground and infiltrate into the collection wells on December 16, 1992.

Photograph Z is purported to show Applicant's

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collection well with water on the surface in front of it but there is no water running out around it and no ice build-up on January 15, 1993.

Photograph 2 (mistakenly identified as Z by Mr. Park) shows that Elmer Severson's headgate is approximately 40 inches wide. Photo taken on December 16, 1992.

Photograph 3 purports to show the depth of the water at Mr. Severson's headgate to be approximately four inches deep.

Photograph 5 shows the water flowing freely through Elmer Severson's headgate with no ice on January 15, 1993.

Jean Ellison objected to all of Applicant's Exhibit 4 since there was no way to identify the photographs and that they could have been taken anywhere. With the exception of Photographs C, G, K, L, 2, and 5, there is no way to identify the photos except as testified to by Bruce Park. Elmer Severson verified that Photographs G, 2, and 5 are of his headgate on North Swamp Creek located below Applicant's reservoir. Michael Howell verified that Photographs G, K, and L are of his property. Applicant offered no legal descriptions of the locations the pictures were supposedly taken nor did it offer a map with correlating locations of the pictures marked on it. Some of the photographs show water flowing freely, but the Hearing Examiner has no way of knowing whether the locations of these pictures are above or below the proposed point of diversion. Several of the pictures were taken to show no ice build-up, but the photographs merely

show snow where the ice could lie beneath the snow. One of the pictures is purported to be a headgate; however, looking at the picture, one would certainly be hard pressed to say that is a headgate. It appears to the Hearing Examiner to be a hole dug into the snow showing nothing. Another picture is supposed to depict water running down into the ground at one of its collection wells; however, the water is not clearly evident, although Mr. Park indicated the water was near the center of the picture and it does not show where the water enters the ground. With the exception of Photographs C, G, K, L, 2, and 5, Jean Ellison's objections are sustained and those photographs are not accepted into the record.

Michael Howell and Elmer Severson objected to all of Applicant's Exhibit 4 based on their belief that the evidence was repetitive and irrelevant. Those pictures taken to show no ice build-up are irrelevant as far as they are intended to show no property damage or possibility of property damage as a result of Applicant spreading water. Property damage or the possibility of property damage as a result of a permittee exercising its water right is not reason to deny a permit. That is a civil matter to be heard in another forum. However, those pictures could be used to show the Applicant's means of diversion, construction, and operation of the appropriation works are adequate or inadequate as the case may be. Since only Photographs C, G, K, L, 2, and 5 were not rejected as a result of Jean Ellison's objection and only G, K, and L relate to the Applicant's water spreading

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activity, the objections of Mr. Howell and Mr. Severson concerning those pictures are overruled and Photographs G, K, and L will be accepted into the record. The pictures of Elmer Severson's headgate are relevant since the headgate is below Applicant's reservoir and return ditch and these pictures show water flowing in North Swamp Creek below Applicant's diversion point that can be used to satisfy the prior stock water rights downstream of Applicant's proposed point of diversion. The Objections of Mr. Howell and Mr. Severson concerning these pictures are overruled and Photographs C, 2, and 5 are accepted into the record.

Objector Howell offered two exhibits for inclusion into the record.

Objector Howell's Exhibit 1 is an eight by ten photograph showing ice on his property allegedly coming from Applicant's property in December 1991. Applicant objected to this exhibit alleging the ice is coming from Howell's own headgate rather than Applicant's spreading water. However, a smaller print of this same picture is a part of the Department file which has been accepted into the record in its entirety. Therefore, the objection is moot.

Objector Howell's Exhibit 2 is a blue print copy of an aerial photograph showing the two creeks involved in blue, the various ditches and the headgate shared by Howell and Applicant in green, property boundary lines in red ink, and the black is

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other ditches. This exhibit was accepted into the record without objection.

PRELIMINARY MATTERS

On December 28, 1990, the Department received an Application for Beneficial Water Use Permit from the Town of Stevensville to appropriate 1.25 cubic feet per second up to 451.20 acre-feet of the waters of Mill Fork Creek at a point in the NE¼NE¼NW¼ of Section 31, Township 9 North, Range 19 West, in Ravalli County, Montana. The proposed use was municipal and the proposed places of use were the E½ of Section 26 and the W½ of Section 27, both in Township 9 North, Range 20 West, Ravalli County. The proposed means of diversion was a headgate from whence the water was to be spread over the city property and piped to the municipal reservoir from collection wells or cisterns used to recover the water after filtration. The proposed period of appropriation was from October 15 through April 15, inclusive of each year.

Pertinent portions of the application were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source on October 16, 1991. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. The Department received eight timely objections to the application.

On February 27, 1992, the Department received an amended application changing the source of water to North Swamp Creek and the proposed point of diversion to the NE¼SW¼NE¼ of Section 31,

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Township 9 North, Range 19 West, Ravalli County, and adding a point of diversion in the SE¼SE¼NE¼ of said Section 31. The amended proposed period of diversion was from January 1 through December 31, inclusive of each year. The proposed flow rate was amended to 5.00 cubic feet per second. The proposed flow rate was reduced to 1.25 cubic feet per second by a letter from Applicant dated August 28, 1992. Pertinent portions of the amended application were published in the *Ravalli Republic* on November 4, 1992, and additional individual notices were sent to individuals and agencies by first-class mail. One additional timely objection was received to the amended application.

In its opening statement at the hearing, Applicant amended its proposed period of use to October 15 through April 15, inclusive of each year. This amendment was not published.

Elmer Severson and Arlo and Jean Ellison objected to this amendment and Jean Ellison objected to the entire application indicating it is difficult to object when they don't know what the Applicant is requesting.

An Application for Beneficial Water Use Permit may only be altered after public notice of the application if the changes would not prejudice anyone, party or non-party, *i.e.*, those persons who received notice of the application as originally proposed but did not object would not alter their position due to the amendments. See *In re* Applications W19282-s41E and W19284-s41E by Ed Murphy Ranches, Inc. To cause prejudice, an amendment must suggest an increase in the burden on the source beyond that

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identified in the notification of the application as originally proposed. Such a suggestion of increased burden would be inherent in an amendment to expand the period of diversion, reduce return flows, increase the rate of diversion, increase the volume of water diverted, add an instream impoundment, or other such controlling parameters of the diversion. Conversely, there are many amendments that would not suggest an increase in the burden, such as a reduction in the place of use or period of use. See *In re* Application 50272-g42M by Joseph F. Crisafulli.

The unpublished change in this application cannot cause prejudice since the period of use was reduced, although the change may have caused some inconvenience to those who would not have attended the hearing if they had known Applicant was going to reduce the period of appropriation to exclude the irrigation season. Therefore, the objections of Elmer Severson and Arlo and Jean Ellison to the changes in the Application are overruled.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make to following:

FINDINGS OF FACT

1. Mont. Code Ann. § 85-2-302(1) (1991) states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

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2. The Town of Stevensville duly filed Application 76760-s76H on December 28, 1990, and on February 27, 1992, filed an amended application. (Preliminary Matters, *supra* and Department file.)

3. Pertinent portions of the original application were published on October 16, 1991, and of the amended application were published on November 4, 1992, in the *Ravalli Republic*, a newspaper of general circulation in the area of the source. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. Eight timely objections and one untimely objection were received to the original application and one additional timely objection was received to the amended application. Applicant was notified of the eight timely objections to the original application by a letter from the Department dated November 18, 1991, and of the one additional timely objection to the amended application by a letter from the Department dated December 28, 1992. (Department file.)

4. Applicant seeks to appropriate 1.25 cubic feet per second not to exceed 451.20 acre-feet of the waters of North Swamp Creek at a point in the SE¼SE¼NE¼ of Section 31, Township 9 North, Range 19 West, Ravalli County,[1] for municipal use in the

[1]Although two points of diversion were identified on the Application and in the notice, it was established during the hearing the proposed point of diversion is in the SE¼SE¼NE¼ of Section 31, Township 9 North, Range 19 West, in Ravalli County.

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Town of Stevensville which is located in parts of Sections 26 and 27, both in Township 9 North, Range 20 West, Ravalli County. The proposed period of diversion is from October 15 through April 15, inclusive of each year. The proposed means of diversion is a headgate and ditch. The water would then flow from the ditch and be allowed to spread over 25 acres owned by Applicant to percolate down through the soil where it would enter approximately one mile of perforated pipe which would carry water to four collection wells where it would then be piped to an off-stream reservoir with a capacity of 1.4 acre-feet in the $NE\frac{1}{4}NE\frac{1}{4}NE\frac{1}{4}$ of Section 36, Township 9 North, Range 20 West, Ravalli County. From the reservoir, the water would be transported by an eight-inch and ten-inch mainline to the Town of Stevensville. The reservoir is equipped with an automatic shut-off that bypasses, by means of a return flow ditch, all water piped from the underground perforated pipe and routes it to North Swamp Creek when the reservoir is full. (Department file, testimony of Bruce Park, Applicant's Exhibit 1, and Objector Howell's Exhibit 2.)

5. Applicant's proposed means of diversion, a headgate, is a wooden structure approximately 18 inches wide. After water is diverted from North Swamp Creek, it flows through a weir in the ditch where the water can be measured. (Testimony of Bruce Park and Vernon Woolsey.)

6. Applicant has used the waters of North Swamp Creek during the winter months since the early 1900's. The system was

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completely revamped in 1931 with the beginning of the present system being installed at that time. It has been improved since then with the last improvements being made in the mid-1970's. When Applicant added 457 feet of ten-inch perforated water collection line at a depth of approximately 14 feet below the ground surface to its system in 1974, it stated on page 3, item 1.05, of the Technical Provisions, section 1 of "Specifications for Infiltration Line on Water System Improvements" (Applicant's Exhibit 3),

> The reason this project is being constructed is to develop a better and more secure means of collecting ground water for the town's water supply. The Contractor shall take this into consideration when planning his construction activities and shall anticipate wet conditions throughout. As part of this planning he shall provide pumping and dewatering equipment required by the field conditions he encounters during the construction. In October of 1973 the average ground water level was found to vary from 6 to 8 feet below the average ground surface in the vicinity of well No. 3. (Emphasis added.)

Applicant is appropriating an unknown amount of subsurface water. It is not known if that water is a part of North Swamp Creek and Mill Creek underflow or whether it is truly groundwater supplied by an aquifer. It is not known how much of the water applied to the surface of the 25 acres actually reaches the perforated pipe, some of which is 17 feet below the ground surface. (Applicant's opening statement, Applicant's Exhibit 3, and testimony of Bruce Park and Ralph Wood.)

7. Bruce Park testified that Applicant's system cannot function without the addition of surface water. There have been

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times in the past when it has had all three wells going and still wasn't maintaining more than six inches of water in the reservoir which is not sufficient. This has not been the case in the last two years, but Mr. Park is certain that the system cannot operate without the addition of the surface water. (Testimony of Bruce Park.)

8. Although Applicant stated in a letter to the Department dated August 28, 1992, that approximately 95 percent of the water spread on the surface of the 25 acres is recovered by the perforated pipe and that this is substantiated by "flow charts" presented with the letter, they have no way of knowing how much of the water is recovered since the only water measured is the surface water as it is diverted from North Swamp Creek and the water that passes through the mainline into Stevensville which includes an unknown amount of subsurface water. Applicant has no method to measure the water that is collected by the perforated pipes, routed into the collection wells, then piped to the reservoir. The "flow charts" are simply readings of the meter on the mainline from the reservoir to Stevensville. (Testimony of Bruce Park and Department file.)

9. It is virtually impossible for Applicant to use more than 50 miner's inches (1.25 cubic feet per second). Applicant has been appropriating from 17 to 30 miner's inches (0.425 to 0.75 cubic feet per second) from North Swamp Creek this winter (1992-1993). (Applicant's opening statement, testimony of Bruce Park and Applicant's Exhibit 1.)

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10. Originally Applicant had a water right on North Swamp Creek; however, it was a fourth right. North Swamp Creek is a small stream that flows between 200 and 250 miner's inches steadily throughout the year. North Swamp Creek is decreed with a first right of 408 miner's inches, a second right of 45 miner's inches, a third right of 20 inches and then Applicant's fourth right. Applicant has never been able to use the waters of North Swamp Creek during the period of April 16 to October 15. It claims to have a decreed right for 50 miner's inches from Mill Creek that is used during that period. (Applicant's opening statement and testimony of Bruce Park and Elmer Severson.)

11. When Mill Creek water is used to flood the 25 acres in the winter, it freezes and causes icing problems. Applicant's use of Mill Creek water has always iced over what is now Mr. Howell's property during the approximate 90 years of the use of the system in sub-zero weather. North Swamp Creek water is approximately 4 to 5 degrees warmer than the water of Mill Creek. Because North Swamp Creek water is warmer, it does not freeze as quickly and therefore does not cause the icing problems as quickly. More important than the temperature is the amount of water flowing in the creek. After the water flows in a cold stream bed for a few miles, there is very little difference in the temperature. In December of 1992, North Swamp Creek froze during a cold weather period. However, it backed up the stream, cut under the ice, and has been running under the ice since that time.

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There is some icing on Mr. Howell's property this year. However, there is contention as to the cause of the icing. Mr. Howell claims the icing is caused by Applicant flooding the 25 acres with North Swamp Creek water. Applicant contends the icing is caused by Mr. Howell's ditch which is leaking at the headgate due to damage caused by some rodent. Vernon Woolsey testified that a muskrat or something has burrowed into the area around Mr. Howell's headgate causing it to leak.

Mr. Howell and Applicant share the headgate located on North Swamp Creek. The ditch is shared until it reaches a point in the NW¼SW¼NE¼ of Section 31, Township 9 North, Range 19 West, where Mr. Howell has a headgate and ditch to transport his North Swamp Creek water to his property for irrigation. Mr. Howell does not use North Swamp Creek water in the winter months. Mr. Howell intimated that if Applicant were not diverting the water from North Swamp Creek there would be no water in the ditch to leak through his headgate. (Testimony of Bruce Park, Elmer Severson, Vernon Woolsey, Ralph Wood, and Michael Howell; Applicant's Exhibits 1, 4G, and 4K; Objector Howell's Exhibits 1 and 2; and Department file.)

12. There is no berm or dike around Applicant's 25 acres to keep the spreading water from escaping. It appears from the copy of an aerial photograph in the file and Objector Howell's Exhibit 2 that there are natural drainages and low places that allow the water to escape from Applicant's property. Water that escapes Applicant's property is not beneficial to the Applicant and

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results in waste of water when it cannot be beneficially used by neighboring property owners. (Objector Howell's Exhibit 2 and Department file.)

13. According to Vernon Woolsey, Water Commissioner, Applicant was appropriating .67 cubic feet per second or 26.8 miner's inches of water from North Swamp Creek on November 22, 1992. On December 11, 1992, it was appropriating .515 cubic feet per second or 20.6 miner's inches from North Swamp Creek. December 23, 1992, Applicant's appropriation from North Swamp Creek was .39 cubic feet per second or 15.6 miner's inches of water. On January 18, 1993, Applicant was appropriating .39 cubic feet per second or 15.6 miner's inches and on February 1, 1993, .44 cubic feet per second or 17.6 miner's inches of water from North Swamp Creek. Mr. Woolsey estimated the flow of North Swamp Creek at Applicant's diversion to be approximately 50 miner's inches (1.25 cubic feet per second).

On December 11, 1992, there was no discharge from Applicant's reservoir. However, on December 23, 1992, there was an estimated flow of .375 to .625 cubic feet per second (15 to 25 miner's inches) flowing from the reservoir and on January 18, 1993, an estimated flow of .375 cubic feet per second (15 miner's inches) plus flowing from Applicant's reservoir. On February 1, 1993, there was an out flow of .30 to .375 cubic feet per second (12 to 15 miner's inches) from Applicant's reservoir.

On December 11, 1992, 2.05 cubic feet per second (82 miner's inches) of water in North Swamp Creek was measured flowing

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through Elmer Severson's headgate located below Applicant's reservoir and return ditch approximately .75 of a mile from the proposed point of diversion. There was a flow of 2.7 cubic feet per second (108 miner's inches) measured at the same location on January 18, 1993. On February 1, 1993, the flow rate of North Swamp Creek through the headgate was measured at 2.05 cubic feet per second (82 miner's inches). (Testimony of Vernon Woolsey.)

14. Applicant has three wells that can be put on line when the weather becomes so cold that the freezing becomes a problem. However, these wells only produce approximately 600 gallons per minute which is not adequate to supply the Town of Stevensville and provide the necessary fire protection. Applicant also has drilled a test well that shows a capacity of 900 gallons per minute. However, that well has not been developed into a production well. Objector Howell suggested that Applicant should utilize the existing wells and develop the new well instead of trying to use the waters of North Swamp Creek. (Testimony of Bruce Park and Michael Howell.)

15. Applicant filed a late claim with the Montana Water Court claiming a decreed right to 200 miner's inches from North Swamp Creek with a priority date of May 5, 1909. The instant application was filed as a precaution should the late claim be rejected. (Testimony of Larry Schock and Department file.)

16. North Swamp Creek terminates where it flows into Supply Ditch at a point in the NE¼SE¼NW¼ of Section 26, Township 9 North, Range 20 West, approximately 2.5 miles from Applicant's

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proposed point of diversion. There are seven stock water rights of record in this reach of the stream.[1] The claimed total number of animal units utilizing North Swamp Creek is 1,048.5. The Montana Water Court decrees 30 gallons of water per day per animal unit. At 30 gallons per day, the required amount of water needed per day for 1048.5 animal units is 31,455 gallons per day. A stream of water flowing one cubic foot per second produces 646,272 gallons of water per day, 614,817 gallons per day more than needed to supply the claimed number of cattle drinking from North Swamp Creek during the proposed period of diversion. There are no other water rights for North Swamp Creek use during the period of appropriation requested by Applicant. (Testimony of Larry Schock, recognized technical fact, and Department file and records.)

17. Ellison Cattle Company waters its stock from Mill Creek until it freezes in the winter. When that occurs the stock drink from North Swamp Creek. If North Swamp Creek freezes, Ellison Cattle Company has to rely on wells for stock water. Ellison Cattle Company has filed Statement of Claim W105003-76H for stock

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[1]The flow rates claimed in these Statements of Claim cannot be totalled to show a complete picture of the stock water rights in this reach of stream because some of the claims are inflated. For example, one claimant claimed 150 miner's inches (1683 gallons per minute) of water for 125 cattle and 10 horses simply because that was the amount decreed. However, that amount was decreed for irrigation not stock water.

There may be other users of stock water from North Swamp Creek that did not file statements of claim before the Water Court since stock water based upon instream flow or ground water sources was specifically exempt from the adjudication process.

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water from North Swamp Creek. (Testimony of Arlo and Jean Ellison and Department records.)

18. Some of the Objectors fear the amount of water flowing in North Swamp Creek will be diminished to the point where it will freeze to the bottom and will not be a viable source for stock water. (Testimony of Elmer Severson.) If Applicant appropriates 1.25 cubic feet per second of water from the stream when there are only 2.05 cubic feet per second flowing in the stream, that would leave a flow rate of .8 of a cubic foot flowing in the stream. It is not known if the stream would freeze to the bottom with that flow rate.

19. There are no other planned uses or developments for which a permit has been granted or for which water has been reserved with which the proposed appropriation would interfere unreasonably. (Department records and testimony of Larry Shock.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1, 2, and 3.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. See Finding of Fact 1.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the

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following criteria set forth in Mont. Code Ann. § 85-2-311(1) and (4), are met:

> (a) there are unappropriated waters in the source of supply at the proposed point of diversion:
> (i) at times when the water can be put to the use proposed by the applicant;
> (ii) in the amount the applicant seeks to appropriate; and
> (iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;
> (b) the water rights of a prior appropriator will not be adversely affected;
> (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
> (d) the proposed use of water is a beneficial use;
> (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and
> (f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.
> . . .
> (4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed beneficial use of the water, municipal, is a beneficial use. Mont. Code Ann. § 85-2-102(2), (1989). The amount requested is within the Department guidelines for such a use; therefore the use is not excessive and there will be no waste. However, any water that flows on neighboring property as a result of Applicant's appropriation is not a beneficial use and

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constitutes waste. Mont. Code Ann. § 85-2-102(15) (1989). Applicant must construct a berm or other means to restrict the water to its 25 acres. See Findings of Fact 12.

5. Applicant failed to file a Statement of Claim with the Water Court to claim its water rights. Failure to file a claim of an existing right constitutes a forfeiture of the water right. Therefore, since May 1, 1982, Applicant has been appropriating without a water right. After July 1, 1973, a person may not appropriate water except by applying for and receiving a permit from the Department. Mont. Code Ann. §§ 85-2-301(1) and 302 (1989). Applicants diverted water from the proposed source and for the proposed purpose prior to filing an application or receiving a permit to do so. See Findings of Fact 6, 10, 12, 13, and 15.

Although diverting water without a permit is a misdemeanor and criminal sanctions may apply, the penalties authorized do not include denial of a permit. Mont. Code Ann. §§ 85-2-122 and 46-18-212 (1989). The Department has no statutory authority to deny a permit on such grounds. See In re Application 52031-s76H by Frost. Furthermore, whether the diversion works were first operated "illegally" is not relevant to how data from that operation serves to satisfy the criteria for issuance of a permit. See In re Application 61978-s76LJ by Town.

6. Applicants proved by substantial credible evidence they have possessory interest in the property where the water is to be put to beneficial use. See Findings of Fact 4 and 6. The Town

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of Stevensville has authority as an incorporated municipality to secure, construct, and operate a water supply system for the use of the town or its inhabitants. Mont. Code Ann. Title 7 Chapter 13 (1989).

7. Applicant has provided substantial credible evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed by the Applicant. See Finding of Fact 6, 13, and 16. However, Applicant has failed to meet its burden to show that water is reasonably available in the amount Applicant seeks to appropriate during the period in which Applicant seeks to appropriate. Applicant presented no measurements of the stream flow during the proposed period of appropriation. The only measurements of record near the proposed point of diversion are the measurements taken by Vernon Woolsey at Applicant's weir in the ditch which show Applicant was appropriating much less than the 1.25 cubic feet per second requested in the application. There are no flow measurements of North Swamp Creek at the proposed point of diversion. Mr. Woolsey did measure North Swamp Creek at Elmer Severson's headgate and those measurements were over 1.25 cubic feet per second; however, this headgate is downstream of Applicant's reservoir and two of the three measurements included water added to the stream from that reservoir. See Finding of Fact 9 and 13.

8. The minimum flow rate needed to keep the stream from freezing to the bottom is not known. If the stream did freeze to

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the bottom and could not be used for stock water as a result of Applicant's use, that would constitute an adverse effect to the prior water right owners. Therefore, Applicant has not provided substantial credible evidence that the water rights of a prior appropriator would not be adversely affected. See Finding of Fact 17 and 18.

9. If Applicant constructs a berm or devises some other method to keep the water on its 25 acres and not allow it to escape to neighboring property, it will have provided substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 4, 5, 6, 7, 8, 9, 11, 12, and 14. Although the system is clearly not the most efficient system for supplying water to a municipality, it is not incumbent on an appropriator to use the most efficient means of diversion. *In re* Application 19084-s41I by the City of Helena (1981); *In re* Application 35527-s41H by Lehrer (1984). The system has performed satisfactorily since 1931 except for the icing problem on the property now owned by Mr. Howell. See Findings of Fact 6, 7, and 11.

10. An appropriator may not prevent an applicant from appropriating water simply because the appropriator's headgate has been damaged by rodents and the proposed appropriation will cause water to flow through, around, or under the damaged headgate. See Finding of Fact 11. It is the responsibility of the appropriator to keep his headgate in good condition so that

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it does not leak even when it is not in use. See generally *In re* Applications G120401-41H and G120403-41H by Ryen; *In re* Application 54911-g42M by Sackman.

11. It is true Applicant could use the existing wells and further develop the test well for a municipal water supply. See Finding of Fact 14. However, if an appropriator can make beneficial use of the intended appropriation without adversely affecting senior appropriators, and can meet the relevant statutory criteria, that appropriator is not bound to use water from an alternative source. See *In re* Application 54911-g42M by Sackman; see generally Boyd v. Hoffine, 44 Mont. 306, 120 p. 228 (1911).

12. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 19.

13. There are many unanswered questions concerning this proposed appropriation. What percentage of Applicant's use is subsurface water? Is the subsurface water part of the underflow of North Swamp Creek and Mill Creek or is it truly ground water being supplied by an aquifer? At what temperature does North Swamp Creek freeze to the bottom when flowing at what rate? How much of the water applied to the surface of the 25 acres actually percolates to the perforated pipe and is carried to the reservoir? What is the flow rate of North Swamp Creek at the proposed point of diversion during the proposed period of

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appropriation? See Finding of Fact 6, 7, 8, 9, and 13. All of these questions pertain to the criteria requiring no adverse effect and availability of water in the amount Applicant seeks to appropriate. Mont. Code Ann. § 85-2-311(a)(ii) and (b) (1989). Some of the questions could have been answered if Applicant had provided measurements of the stream from October 15, 1992, to the date of the hearing; however, the majority of these questions can be answered only by qualified persons performing certain tests while Applicant is using its system. Since Applicant has met the burden of proof on the other statutory criteria, and since with certain obtainable information it is likely that the remaining criteria can be met for some amount of appropriation (albeit possibly not for the full flow rate requested), the Hearing Examiner believes that Applicant should be given an Interim Permit for testing purposes, so that it has a chance to develop the necessary data. Furthermore, providing Applicant with an Interim Permit is an efficient mechanism because it avoids the wasteful process of requiring Applicant to reapply, the Department to readvertise, and the Objectors to refile objections and pay the required $50.00 objection fee.

The grant of an Interim Permit should not act as a detriment to the Objectors, since approval of a Provisional Permit is not automatic, but is contingent upon further proof by Applicant that Objectors' prior appropriative rights will not be adversely affected and that unappropriated water is available at the proposed point of diversion during the proposed period of

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appropriation. The grant of an Interim Permit will not harm Applicant since the alternative is to deny its Application on the basis that it has not met the criteria for issuance of a permit. Since the appropriative works are already in place, participation in a testing program will not be unduly financially burdensome.

14. The Department has the authority to issue an Interim Permit authorizing an applicant to begin appropriating water immediately, Mont. Admin. R. 36.12.104 (1989).

15. The purpose of an Interim Permit is to allow the Applicant to begin a testing period, to include actual withdrawal and application to beneficial use, of the water for which the Permit is sought. Because of the uncertainty regarding the actual source of the water *i.e.*, groundwater or surface water, and the amount of water actually available, the grant of an Interim Permit is appropriate herein. Applicant is thereby authorized to gather the data, which is in a large part unobtainable by any other means, necessary for it to show the compliance with the statutory criteria for provisional permit issuance.

16. The issuance of an Interim Permit does not entitle the Applicant to a Provisional Permit. To be entitled to a Provisional Permit, Applicant is still under a duty to show that which remains uncertain: a) the appropriation will not adversely affect the water rights of prior water right owners; and b) there is unappropriated water in the source of supply at the proposed points of diversion, at times when the water can be put to the

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use proposed by the applicant, and that during the period in which the applicant seeks to appropriate, the amount of water is reasonably available.

17. Mont. Admin. R. 36.12.103(c) (1991) requires a fee of $10.00 before the issuance of an Interim Permit, in addition to the regular filing fee.

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

INTERLOCUTORY ORDER

Subject to the terms, conditions, restrictions, and limitations listed below and upon receipt of the proper $10.00 fee an Interim Permit is hereby granted to Applicant to appropriate up to 1.25 cubic feet per second not to exceed 451.20 acre-feet of the waters of North Swamp Creek at a point in the SE¼SE¼NE¼ of Section 31, Township 9 North, Range 19 West, Ravalli County, for testing purposes in parts of Sections 26 and 27, both in Township 9 North, Range 20 West, Ravalli County. The period of diversion shall be from October 15, 1993, through April 15, 1994. The means of diversion is a headgate and ditch from which the water will flow and be allowed to spread over 25 acres in the NW¼ of Section 31, Township 9 North, Range 19 West, to percolate down through the soil to the perforated pipe which will carry water to four collection wells where it will then be piped to an off-stream reservoir in the NE¼NE¼NE¼ of Section 36, Township 9 North, Range 20 West, where the water will be released into the

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return flow ditch for conveyance into North Swamp Creek.

A. The Permittee shall submit the $10.00 filing fee for issuance of an Interim Permit within 30 days of the service date of this Interlocutory Order. A testing program shall be submitted to the Department's Missoula Water Resources Regional Office for approval within 90 days of the service date of this Order. After Departmental approval of the program, the Applicant shall install the necessary measuring devices subject to the approval of the aforementioned Department personnel. Failure to submit the testing program in the aforementioned time period, will cause the above-entitled permit application to be denied.

B. The Permittee shall keep a written record of the flow rate and volume of waters withdrawn, including the times of pumping, shall make these records available to the Department upon request, and at the end of the test period submit all records to the Hearing Examiner.

C. This Interim Permit is subject to all prior existing water rights in the source of supply. Further, this Interim Permit is subject to any final determination of existing water rights, as provided by law.

D. The issuance of this Interim Permit by the Department shall not reduce the Permittee's liability for damages caused by the exercise of this Interim Permit, nor does the Department in issuing the Interim Permit in any way acknowledge liability for damage caused by the Permittee's exercise of the Interim Permit.

E. The water right granted by this Interim Permit is

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subject to the authority of court appointed water commissioners to admeasure and distribute to the parties using water in the source of supply to which they are entitled. The Permittee shall pay its proportionate share of the fees and compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

F. This Interim Permit shall be valid through April 15, 1994, for purposes of testing to determine the effect of Permittee's pumping on North Swamp Creek, to determine whether the subsurface flow is underflow of North Swamp Creek and Mill Creek or ground water, to determine at what temperature and flow rate North Swamp Creek freezes to the bottom, to determine how much of the water applied to the surface of the 25 acres actually percolates to the perforated pipe and is carried to the reservoir, to determine the flow rate of North Swamp Creek during the proposed period of appropriation and to determine the amount of surface and subsurface water diverted by the perforated pipe into the reservoir.

G. Before beginning the test, Applicant shall construct a berm or devise some other method to restrict the waters spread on its 25 acres to that acreage and not allow the water to flow onto neighboring properties.

Failure to perform the test in the time period allowed will result in denial of a permit for this application.

NOTICE

After expiration of this Interim Permit, the record will be

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reopened to receive evidence on the issues of adverse effect and water availability wherein the Applicant and Objectors may present further evidence thereon. After presentation of evidence, the Hearing Examiner will prepare a Proposal for Decision to which all parties will have an opportunity to present exceptions and request oral argument before a final departmental decision is issued.

Dated this 15th day of March, 1993.

Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Interlocutory Order was duly served upon all parties of record at their address or addresses this 15th day of March, 1993, as follows:

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